GEORGETOWN UNIVERSITY LAW CENTER

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MEMORANDUM

To: Senator John Cornyn
From: Susan Low Bloch SLB
Date: March 14, 2005
Re: Misrepresentation in your "Talking Points" on the Filibuster

Senator Cornyn and C. Boyden Gray have seriously misrepresented my views. In a February 28, 2005 memo to journalists on behalf of the Committee for Justice, Mr. Gray suggests that I said the use of the filibuster against judicial nominations is unconstitutional. In Senator Cornyn's "Talking Points" on the Senate Process of Confirming Judges, referred to on Mr. Gray's website, Senator Cornyn makes the same misrepresentation of my views. In fact, I have never said such a thing. On the contrary, in the article they quote (but never cite), I said precisely the opposite, explicitly distinguishing the Senate filibuster from the House Rule that I was criticizing.

In 1996, I participated in a Federalist Society debate on the wisdom and constitutionality of a then-newly adopted House Rule dealing not with judicial nominations but with increases in the tax rates. The new Rule provided: "No bill increasing a federal income tax rate shall be considered as *passed* except by a 3/5 vote." House RuleXXI(5)(c)(1997)(emphasis added.). This Rule, I argued, distorted the constitutional import of what it means for one house to "pass" a bill and therefore, I argued, distorted the constitutional Presentment Rule of the Constitution (Article I, section 7.) Rather than undermining or criticizing the Senate's filibuster rule, I explicitly distinguished it, stating (and here is the language Senator Cornyn chose to ignore: "**Unlike the Senate's filibuster rule, which governs when things come to a vote,** House Rule XXI(5)(c) determines when things get presented to the other chamber and to the President." [1] Thus, the House rule was not just an internal rule of procedure; it was a redefinition of the word "passed" in the Presentment Clause of the Constitution.

Having deep-sized this profoundly important (and obviously inconvenient) distinction, Senator Cornyn and Mr. Gray proceed to quote an entirely different paragraph where I discuss what might happen if the Senate hypothetically decided to follow the House's lead and amend its

[1] Susan Low Bloch, "Congressional Self-Discipline: The Constitutionality of Supermajority Rules," 14 Const. Comment. 1 (1997) (emphasis added).

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rules to **require a supermajority** for the confirmation of presidential nominees. In that context (one having nothing to do with filibusters), I note that such a rule change would create constitutional issues.

It should be obvious that the time-honored use of a filibuster to allow senators to express their views and to decide when to cut off debate and schedule a vote is **not equivalent** to a rule change requiring a supermajority to "confirm." Indeed, it is not a rule change at all. Everyone agrees: Senate confirmation requires simply a majority. No one in the Senate or elsewhere disputes that. The question is the constitutionality of the ability of senators to debate until they believe the matter has been thoroughly discussed and should be scheduled for a vote.

There is, in sum, a significant difference between a rule change that attempts to require a supermajority to "pass" a bill or "confirm" a nominee, when the Constitution clearly requires only a majority, and an internal rule of proceeding that says every senator can speak on a matter unless and until a supermajority decides it has heard enough. The first tampers with the Constitution; the second is an internal rule of procedure. The difference is subtle, but its pedigree is long and valuable. Both sides of the aisle should respect it. Senator Cornyn and Mr. Gray are, of course, free to continue to ignore the distinction if they are so inclined. But they are not free, by means of cut-and paste-advocacy, to misrepresent my views.